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Nos. 93-517, 93-527, 93-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION
OF THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

LOUIS GRUMET, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause prohibits a state, in order to provide a government program of secular instruction for handicapped children, from accommodating the childrens' religious and cultural background by creating a school district congruent with a religiously homogenous municipality.

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INTEREST OF *AMICUS CURIAE*[1]

This case presents significant questions concerning the accommodation of religious persons who reside in a political community composed of people subscribing to the same religious beliefs. The State of New York has allegedly created an unlawful "religious gerrymander" by empowering a political unit with a presumably homogenous religious majority to provide educational services to its handicapped children. This case thus presents important questions about the extent to which a state may accommodate religious and cultural distinctions in

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

providing secular education to handicapped children and whether the State's franchise of a political community with a religiously homogeneous population is a violation *per se* of the Establishment Clause.

Amicus Curiae — The Rutherford Institute — has as one of its principal purposes the elimination of governmental discrimination against persons or groups based on their religious beliefs. The resolution of the issues presented by this case is not only important to the jurisprudence of the First and Fourteenth Amendments, it is vital to the furtherance of religious tolerance as reflected in the accommodation of citizens whose religious beliefs foster "a way of life that [may be] odd or even erratic but interferes with no rights or interests of others. . . ." *Wisconsin v. Yoder*, 406 U. S. 205, 224 (1972).

Amicus Curiae is a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish theologian and Rector at St. Andrew's University. With its international office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants in the 50 states and to participate in cases relating to the Free Speech and the Religion Clauses of the First Amendment. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioner, Board of Education of the Kiryas Joel School District. It is nevertheless appropriate to restate succinctly what few facts are genuinely relevant to this *facial* challenge to the constitutionality of Chapter 748 of the Laws of 1989 of the State of New York ("Chapter 748").

Chapter 748 creates a public school district for the Village of Kiryas Joel (an incorporated municipality in the Town of Monroe, Orange County, New York). It establishes a board of education composed of from five to nine members elected by the voters of the Village. *Grumet v. Board of Education*, 81 N. Y.2d 518, 525, 618 N. E.2d 94, 97 (N. Y. 1993). Chapter 748 contains *no* peculiar religious language. It simply creates a New York school district under a law similar to those creating other New York school districts.[2]

There is no allegation in this case that a defined religious institution such as a parochial school or church is unlawfully receiving state assistance. Likewise, no religious curriculum or religious practice is being taught, propagated or proscribed in the public schools. Nor is there any dispute that the *only* educational services the Kiryas Joel School District provides under its general statutory powers is a secular program for teaching handicapped children residing within the Village (or children under contract with other school districts). Moreover, the Village School District's limited use of its more general powers squares with the legislative intent to accommodate the Village's unique problem of providing an acceptable learning environment for the Village's otherwise minority-religion handicapped children. But for the difficulties encountered in their attendance at the neighboring Monroe-Woodbury Central School District, and the consequent attempted accommodation in the Village School District, there would be no Establishment Clause challenge in this case.

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[2] The only apparent reference to religion in the legislative history enacting Chapter 748 is an indication in the Governor's Approval Memorandum that it represents "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the Village of Kiryas Joel, whose population are all members of the same religious sect." *Id.* This statement recognizes the legislative intent to resolve a dispute among municipalities in the State of New York in the provision of services for the handicapped. It also recognizes the accommodation made for the benefit of the Village of Kiryas Joel.

SUMMARY OF ARGUMENT

Chapter 748 does not provide financial assistance to any religious institution such as a parochial school or church. Nor does it prescribe or proscribe religious teaching or practices. Instead, it simply creates in *neutral* fashion a public school system for the Village of Kiryas Joel in order to provide a limited program of education for handicapped children residing there.

In Establishment Clause jurisprudence, this Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 455 U. S. 668, 679 (1984). Although Respondents and the New York Court of Appeals have invoked the tri-partite test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), the standard of review best suited to the review of New York's allegedly *neutral* political line-drawing in this case is an equal protection analysis that properly takes into account both Establishment Clause "neutrality" *as well as* the allegations of "religious gerrymandering" and *de jure* segregation.

This Court has heretofore recognized that the principle of "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970). Moreover, it only reaffirmed last Term that "[i]n determining if the object of a law is a neutral one, we can. . . find guidance in our equal protection cases." *Church of Lukumi Babalu Aye v. City of Hialeah*, ___U. S. ___, 113 S. Ct. 2217, 2230 (1993); *citing Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Neutrality and equal protection principles properly account for the practical reality that "[i]n the line-drawing process, racial, *religious*, ethnic, and economic gerrymanders are all [deemed to be] species of political gerrymanders." *Mobile v. Bolden*, 446 U. S. 55, 88 (1980) (Stevens, J., concurring in the judgment) (emphasis added).

Under this Court's gerrymandering cases, claimants must present not only evidence of intentional invidious discrimination based on a suspect classification, but evidence of adverse degradation of "a voter's or a group of voters' influence on the political process." *See Davis v. Bandemeer*, 478 U. S. 109, 132-133 (1986); *see also, Wright v. Rockefeller*, 376 U. S. 52 (1964), *Mobile v. Bolden*, 446 U. S. 55 (1980), and *Rogers v. Lodge*, 458 U. S. 613 (1982). A similar evidentiary inquiry is all the more required in the present case because the State action was allegedly taken, in part, as a benevolent accommodation to the Satmar Hasidim. In matters of race, no Clause explicitly guarantees "affirmative action," but in matters of religion, the Free Exercise Clause explicitly contemplates *affirmative* accommodation of rights of conscience, particularly when the accommodation furthers secular objectives and does not adversely affect others or primarily advance religious ends. *Bowen v. Kendrick*, 487 U. S. 589, 621-622 (1988).

In the absence of any evidence from Respondents showing that the object of Chapter 748 was intentional invidious discrimination, Chapter 748 must survive *facial* attack. A review of its object or purpose yields the conclusion that this facially *neutral* law "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion or cluster of religions." *Gillette v. United States*, 401 U. S. 437, 452 (1971). It represents a legitimate means of advancing handicapped education and accommodating, without endorsing, the Satmar Hasidim culture. The school system does not teach Satmar Hasidim doctrine, nor does it advance that religion's practices in any respect, but, in fact, integrates Satmar Hasidim children into the secular realm from which they are apparently otherwise separated. Here, non-sectarian public educators teach a secular curriculum at a neutral site in a neutral manner. And no evidence has been offered by Respondents about offending programs, courses, teachers, or books that might suggest the contrary. Absent hard evidence, further inquiry must await

Respondents' "as applied" challenge on a complete evidentiary record.

It would be an unprecedented and grave mistake for this Court to adopt a *per se* rule requiring invalidation of a governmental subdivision solely because of the religious homogeneity of the Village's political community. This Court should not yield to the commands of purported constitutional doctrine that would ignore the *neutral* means by which a political community seeks to provide a *neutral* program of secular educational services for the handicapped in a manner that does *not* discriminate invidiously on the basis of religion or otherwise advance or endorse religion.

ARGUMENT

I. INTRODUCTION.

This is a case of first impression. The central issue, as noted Chief Judge Judith Kaye in concurrence below,[3] is not one of state aid to religious institutions or the validity of prescribed or proscribed religious instruction or practices, but whether the New York General Assembly's political line drawing providing services to handicapped children living within the homogenous Kiryas Joel religious community is constitutional. The issue is thus one of alleged political gerrymander and *de jure* segregation on the basis of religion. *Id.* 81 N. Y.2d at 536, 618 N. E.2d at 105. For purposes of constitutional analysis, the case arises at the intersection of the Religion and Equal Protection Clauses.

II. SEPARATION, ACCOMMODATION AND PUBLIC WELFARE LEGISLATION.

This Court's Religion Clause doctrine rests on certain assumptions as to the scope of state as well as religious activities.

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[3] *See* discussion and cases cited in concurring opinion of Chief Judge Judith Kaye, *Grumet* v. *Board of Education*, 81 N.Y.2d at 533, n.2 and n.3, 618 N.E.2d at 102, n.2 and n.3.

The basic principles underlying the Religion Clauses are, of course, the separation of church and state and the accommodation of individual rights of conscience. Separation principles presuppose that the government's role in society is limited and that religious activity takes place within discrete bounds which the state cannot and should not reach and within which religion should function. In contrast, accommodation principles permit, and, at times, require the state to withdraw from certain spheres where its actions unnecessarily threaten individual rights of conscience and free exercise.

While it is axiomatic that the "[Establishment] Clause *does* absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," *Grand Rapids School District v. Ball*, 473 U. S. 373, 385 (1985) (emphasis added); *Walz v. Tax Commissioner*, 397 U. S. 669, 668 (1970), the boundaries of the Establishment Clause are nevertheless more blurred and indistinct when it comes to the collision of pervasive government welfare programs with religious activity and practice. Because "[no] institution within [society] can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government," *Lynch v. Donnelly*, 465 U. S. 668 (1984) *quoting Zorach v. Clauson*, 343 U. S. 306, 314-315 (1952), it becomes necessary — indeed, inevitable, in light of vitally held political and religious convictions — for legislatures (and courts) to resolve conflicts arising at the crossroads of state action and private religious tenets. *See, e.g., West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Wisconsin v. Yoder*, 406 U. S. 205 (1972); *Wooley v. Maynard*, 430 U. S. 705 (1977).

In evaluating these and other conflicts under the Free Speech and Religion Clauses of the First Amendment, this Court has routinely acknowledged that accommodation of the religious beliefs of the American people is necessary or permitted

to achieve both the broad purposes of the Religion Clauses and the public welfare objectives of the modern administrative state. *See, e.g., McGowan v. Maryland*, 366 U. S. 420 (1961); *Roemer v. Board of Public Works*, 426 U. S. 761 (1976); *Presiding Bishop v. Amos*, 483 U. S. 327 (1987); *Bowen v. Kendrick*, 487 U. S. 589 (1988). Thus, although the Free Exercise Clause may not necessarily *require* society to accommodate religious practice under "neutral laws of general applicability," *Employment Division v. Smith*, 494 U. S. 872 (1990),[4] this Court has nevertheless recognized that "a society that believes in the negative protection afforded [by the First Amendment] to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.* at 890. Legislative accommodation of rights of conscience is consistent with earlier pronouncements of this Court that "government may (and sometimes must) accommodate religious practices and. . . it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U. S. 136, 144-145 (1987).

The permitted reach of accommodation is often at issue.[5] Whether or not government should accommodate a particular religious practice depends in large degree on an evidentiary finding whether the governmental program is, or threatens to become, primarily religious or whether, despite incidental benefits to religion, its primary objective and operation remains, and is likely to remain, secular. *Bowen v. Kendrick*, 487 U. S. at 605-618.

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[4] *But see*, the apparently higher standard imposed on government action by The Religious Freedom Restoration Act, P. L. No. 103-141, November 16, 1993, 107 Stat. 1488-1490.

[5] It is clear that "[g]overnment can *accommodate* religion by lifting government-imposed burdens on religion," *Allegheny County v. Greater Pittsburgh ACLU*, 492 U. S. 573, 631 (1987) (O'Connor, J. concurring) (emphasis in original). This includes "alleviat[ing] significant governmental interference" with religious practice (*Presiding Bishop v. Amos*, 483 U. S. 327, 335 (1987)) and removing "a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause." *Texas Monthly v. Bullock*, 489 U. S. 1, 18, n. 8 (1989). And the Court has never held "that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.*

III. BENEVOLENT GERRYMANDERING — A PERMITTED MEANS OF ACCOMMODATION?

Unlike virtually all other Establishment Clause cases challenging aid to education, the unique aspect of the present case is that no defined religious institution such as a parochial school or church is alleged to have received assistance. Nor has the state prescribed or proscribed religious teaching or practices. Instead, New York has simply created a public school system for the Village of Kiryas Joel. The system is subject to the same laws and regulations governing public education in the State of New York as any other school district.

Chapter 748 in and of itself thus presents no particular constitutional problem. Rather, it is the congruence of the Village of Kiryas Joel with its Satmar Hasidim population that presents the heart of this facial constitutional challenge. Has, then, the State of New York effected a "religious gerrymander" by creating a school district in a religiously homogenous political unit? And does its grant of governmental power to an elected school board in that unit exceed constitutional boundaries when the school district limits its activities to providing only a program of secular education to handicapped children?

Although the Respondents have argued that this case should be reviewed under the tri-partite test set forth in *Lemon v. Kurtzman*,[6] this Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 455 U. S. at 679. It has, in fact, eschewed the *Lemon* test on more than one occasion and employed several other legal frameworks depending upon the

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[6] 403 U. S. 602 (1971).

nature of the Establishment Clause challenge before it. *See, e.g., Larson v. Valente*, 456 U. S. 228 (1982) (Equal Protection standard); *Marsh v. Chambers*, 463 U. S. 783 (1983) (Original Intent standard); *Lee v. Weisman*, 505 U. S. ___, 112 S. Ct. 2649 (1992) (Coercion standard); and *Zobrest v. Catalina Foothills School District*, ___U. S.___, 113 S. Ct. 2462 (1993) (General government program/Private choice standard).

Because the present case raises only a *facial* challenge to a legislative enactment involving the delegation of the state's political power, the standard of review best suited to the facts and circumstances is not the *Lemon* test, but an equal protection standard. The latter standard more properly accounts for the allegations of "religious gerrymandering" and *de jure* segregation arising from New York's allegedly *neutral* political line drawing. After all, the Establishment Clause principle of "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Commission*, 397 U.S, 664, 696 (1970). And this Court only reaffirmed in another Religion Clause case last Term that "[i]n determining if the object of a law is a neutral one, we can also find guidance in our equal protection cases." *Church of Lukumi Babalu Aye v. City of Hialeah*, ___U. S. ___, 113 S. Ct. 2217, 2230 (1993). Those cases suggest that the object of a law is to be determined from an inquiry into "both direct and circumstantial evidence" of an intentionally discriminatory legislative purpose. *Id., citing Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977).[7]

[7] In *Church of Lukumi*, the Court was concerned with the alleged targeting and burdening of a specific religion. In evaluating the alleged intentional discrimination, the Court stated that the "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id., citing Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. at 267-268; *see also, Washington* v. *Davis*, 426 U. S. 229 (1976).

The "neutrality" principles from Religion Clause cases thus readily coincide with the gerrymandering principles this Court has applied in cases where "[i]n the line-drawing process, racial, *religious*, ethnic, and economic gerrymanders are all [deemed to be] species of political gerrymanders." *Mobile v. Bolden*, 446 U. S. 55, 88 (1980) (Stevens, J., concurring in the judgment). Such legislative apportionments may "violate the Fourteenth Amendment if their purpose [is] invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." id. at 66 (plurality opinion); *Shaw v. Reno*, ___U. S.___, 113 S. Ct. 2828 (1993). Thus, under this Court's Equal Protection gerrymandering cases,[8] claimants must present not only *proof* of intentional discrimination based on a suspect classification, but *evidence* of adverse degradation of "a voter's or a group of voters' influence on the political process as a whole" or "*evidence* of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Davis v. Bandemeer*, 478 U. S. 109, 132-133 (1986)(emphasis added). The system in question must be "'conceived or operated as [a] p[urposeful devic[e] to further. . .discrimination.'" *Rogers v. Lodge*, 458 U. S. at 619, *quoting Mobile v. Bolden*, 446 U. S. at 66, and *Whitcomb v. Chavis*, 403 U. S. 124, 149 (1971).[9] As Justice Stewart said in the *Mobile* case (which dealt with line drawing on racial grounds), ". . .where the character of a law is readily explainable on grounds apart from race, . . . disproportionate impact alone cannot be decisive, and courts must look to

[8] *Wright* v. *Rockefeller*, 376 U. S. 52 (1964); *Mobile* v. *Bolden*, 446 U. S. 55 (1980); *Rogers* v. *Lodge*, 458 U. S. 613 (1982); *Davis* v. *Bandemeer*, 478 U. S. 109 (1986).

[9] A finding of "[p]urposeful. . .discrimination invokes the strictest scrutiny of adverse differential treatment," but "[a]bsent such purpose, differential impact is subject only to the test of rationality." *Rogers* v. *Lodge*, 458 U. S. 613, 617, n. 5 (1982), *citing Washington* v. *Davis*, 426 U. S. at 247-248.

other *evidence* to support a finding of discriminatory purpose." *Mobile v. Bolden*, 446 U. S. at 70 (emphasis added).

The analysis of religious discrimination as a "suspect" classification departs somewhat from that employed in matters of race. Whereas there is no Clause explicitly guaranteeing "affirmative action" in matters of race, the Free Exercise Clause explicitly contemplates *affirmative* accommodation of Free Exercise rights of conscience, particularly when the accommodation in question furthers secular objectives and does not adversely affect others or advance religious ends (except perhaps incidentally with its intended secular goals). Thus, when a "religious gerrymander" is alleged as a result of "accommodating" a religious practice, for state action to be unconstitutional, there must be an *evidentiary* inquiry to determine whether that accommodation intentionally advances religion (*Bowen v. Kendrick*, 487 U. S. at 621-622) and results invidiously in "excluding individuals belonging to any other group from enjoyment of the relevant opportunity." *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U. S. 144 (1977); *cf. Larson v. Valente*, 456 U. S. at 255.[10] On the record in the present case, the mere creation of a school district coincident with a religious community does not satisfy the level of proof necessary to demonstrate purposeful invidious discrimination and certainly does not constitute a *per se* violation of the Establishment Clause.

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[10] Chief Judge Kaye, in concurrence below, contends that this case should be reviewed under the standard of review applied in *Larson* v. *Valente*, 456 U. S. 228 (1982). While the Court in the *Larson* case applied an equal protection standard, that case is significantly different from the present case because it involved a statute that *on its face* imposed a *disability* on a religious sect and produced what was, in effect, a denominational preference that directly *burdened* religious practice. The present case, on the other hand, does *not* involve *a facial distinction*, or a preference of one denomination or sect over another, or an alleged demonstrable burden to other denominations or sects or religion or non-religion. Moreover, the purposes of Chapter 748 are *neutral*: providing secular education for the handicapped, resolving a dispute between municipalities and accommodating the minority religion Satmar Hasidim.

Thus, because in the present case (1) there is no facial classification or preference, (2) the purposes are secular and neutral and (3) there is no alleged adverse disability, injury or harm resulting from the accommodation, the *Larson* equal protection analysis, while appropriate as a starting point, should not be dispositive in the absence of an *evidentiary* showing of intentional invidious discrimination and some concrete disability or burden on religious practice. Without such a showing, there is no need for New York to "narrowly tailor" or "closely fit" its chosen means of accommodation.

First, Chapter 748 is a facially *neutral* law. It simply creates a school system. It "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion or cluster of religions." *Gillette v. United States*, 401 U. S. 437, 452 (1971). Apart from its plain language, the enactment's clearly stated purpose is to enable handicapped children in the Village of Kiryas Joel to obtain special educational services. As with other social welfare legislation challenged on Establishment Clause grounds, the "affirmative purposes" of Chapter 748 are "neutral and secular" and "cannot be said to reflect a religious preference." *Id.* at 454; *accord*, *Zobrest v. Catalina Foothills School District*, ___U. S. at ___, 113 S. Ct. at 2469. Indeed, in *Zobrest*, this Court found that "[h]andicapped children. . .are the primary beneficiaries. . . ." and "the function" of the law there was "hardly 'to provide desired financial support for nonpublic sectarian institutions.'" *Id. citing Witters v. Washington Dept. of Services for the Blind*, 474 U. S. 481, 488 (1986). Chapter 748 is even more neutral in purpose, benefit and function. As this Court reasoned in the *Gillette* case:

> The point is that [the] affirmative purposes are *neutral* in the sense of the Establishment Clause. . .it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the

> dictates of conscience. [citing *Abington School District v. Schempp* 374 U. S. 203, 294-299; 306; 309 (1963)]
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> * * * *
>
> *Neutrality* in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties. . . so long as an exemption is tailored broadly enough that it reflects valid secular purposes.

Id. at 453-454 (emphasis added).

Similar reasoning prevailed in this Court's cases upholding Sunday Closing Laws against an Establishment Clause challenge. The Court recognized that "those Laws were "oriented. . .toward improvement of the health, safety, recreation and general well-being of our citizens." *McGowan v. Maryland*, 366 U. S. 420, 444 (1961); *accord, Two Guys v. McGinley*, 366 U. S. 582 (1961); *Braunfeld v. Brown*, 366 U. S. 599 (1961); *Gallagher v. Crown Kosher Market*, 366 U. S. 617 (1961). The Court concluded then, as it has since, that "the 'Establishment Clause' does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *Id.* at 442; *cf. Harris v. McRae*, 448 U. S. 297, 318-320 (1980). And despite the appellants' suggestion that the State of Maryland could achieve its objectives by less intrusive alternatives such as requiring individual citizens to choose an unspecified day for rest during the week, this Court did not require Maryland to alter its selected method of achieving the State's public welfare obligations through its Sunday Closing Laws.

Other public welfare legislation has likewise been upheld against facial Establishment Clause challenge when the purposes for the legislation were found to be aimed at legitimate public welfare objectives. Thus, in *Bowen v. Kendrick, supra*, 487 U. S. 589, this Court upheld Federal social legislation

permitting religious organizations to administer teen and family life programs. Unlike the present case, the *Bowen* legislation on its face specifically required government to make an effort to involve religious organizations in the government programs. Notwithstanding this mandate, the Court found the statutory purposes of eliminating the social and economic problems caused by teenage sexuality, pregnancy and parenthood to be secular in nature. The Court also found that the participation of religious organizations in the government programs was "at most 'incidental and remote'" and created no impermissible "primary effect." *Id.* at 607, 610-615. And it concluded that there was nothing in the record to suggest that "religiously affiliated AFLA [Adolescent Family Life Act] grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner." *Id.* at 612.[11] *Bowen* stands for the proposition that a social welfare statute that *neutrally* authorizes only secular functions must be presumed to operate in a secular manner and can be determined to be unconstitutional *only* after an affirmative *evidentiary* showing to the contrary in an "as applied" challenge. 487 U. S. at 618-622.

The Equal Access Act,[12] a law granting students equal access to public school facilities for religious, philosophical, political and other speech, was also upheld by this Court against an Establishment Clause challenge, notwithstanding the fact that language in the Act was aimed at benefiting religious and other speech. *Westside Community Board of Education v. Mergens*, 496 U. S. 226, 248 (1990). This Court emphasized the importance of looking at the legislative *purpose*, and not the "possibly

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[11] The *Bowen* Court also held that "religious institutions are [not] disabled from participating in publicly sponsored social welfare programs." *Id.* at 609, *citing Bradfield* v. *Roberts*, 175 U. S. 291 (1899)(Federal funding of construction of a hospital conducted under the auspices of the Roman Catholic Church).

[12] The Equal Access Act, P. L. No. 98-377, Title VIII, August 11, 1984, 98 Stat. 1302.

religious motives of the legislators who enacted the law." *Id.* at 249. The Act was aimed at granting affirmative equal access to students for speech activities in public school forums without regard to content of the message. In the present case, Chapter 748 provides access for handicapped children of the Satmar Hasidim to special education services in a religiously *neutral* environment. An accommodation for this purpose, as in the *Mergens* case, presents a "message [that] is one of neutrality rather than endorsement. . . ." *Id.*

IV. DRAWING THE LINE BETWEEN ACCOMMODATION AND ENDORSEMENT OF RELIGION.

The only argument suggesting an impermissible religious purpose in the present case is the one for which the accommodation was actually made, namely, that by permitting the Village's purportedly homogeneous, "separationist" religious population to elect a school board to operate a school system, the State impermissibly endorses "separationist" doctrine and advances religious practices in furtherance of that doctrine. Judge Hancock in the court below described Chapter 748 as being "designed. . .so that the children would remain subject to the language, lifestyle and environment created by the community of Satmar Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion." *Grumet v. Board of Education*, 81 N.Y.2d at 540, 618 N. E. 2d at 107 (Hancock, J. concurring), *quoting Grumet v. Board of Education*, 592 N.Y.S.2d 123 (A.D. 3 Dept. 1992). There are several fallacies to this argument.

First, it runs contrary to fact. The new school district's programs and services do *not* track Satmar Hasidim separatist principles. English, not Yiddish, is the language of instruction. Contrary to Satmar Hasidic practice, male and female instructors teach. Similarly, male and female students are grouped together for teaching without distinction as to instructional materials. The school building is secular in appearance and

devoid of religious symbols. Employee dress is secular. *See Grumet v. Board of Education*, 81 N.Y.2d at 556, 618 N. E. 2d at 117 (Bellacosa, J. concurring). No religious instruction is given at the school. Teachers are hired without regard to religious beliefs. *See* Affidavit of Dr. Stephen M. Benardo, Appendix to the related Board of Education of Monroe-Woodbury Petition for Certiorari, No. 93-527 ("Monroe-Woodbury Appendix"), 117a-118a. Moreover, the "motive for the Satmar parents. . .was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village. . . ." *See Grumet v. Board of Education*, 592 N.Y.2d at 131 (Levine, J. dissenting). These are but a few of the defining characteristics of the school district that, far from "endorsing" religion, depart significantly from Satmar Hasidim beliefs and practices. They also confirm the non-sectarian motivation of the Satmar Hasidim parents who, in seeking the *neutral* accommodation that a local public school system would offer, were obviously troubled by the acculturation problems which arose from attendance in other school districts.

Second, the Respondents' argument that accommodation in this case constitutes State endorsement of "Satmar-separationism" is not born out in law or fact. Certainly, this Court's ruling in *Wisconsin v. Yoder*[13] — which accommodated Amish practices to isolate, insulate and separate Amish children from influences of the outside world — was *not* deemed to be an Establishment of religion. Indeed, there is a certain irony in the Respondents' endorsement argument since, in the present case, unlike *Yoder*, if Chapter 748 is upheld, Satmar Hasidic children will actually be integrated into a secular learning environment that will enable them to function in the outside world, notwithstanding Satmar Hasidim "separationist" doctrine. Petitioner's Reply Memorandum on the Petition for Certiorari

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[13] 406 U. S. 205 (1972).

at 7. Moreover, in cases such as this — involving the lifting of government burdens on the free exercise of religion — "a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice convey[s] a message of endorsement." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U. S. at 632 (O'Connor, J. concurring). The accommodation here is thus incidental, if at all related, to the Satmar Hasidic faith.

Thirdly, neither the State, nor this Court should accept the Respondents' invitation to inquire into the norms of the Satmar Hasidim. The greater the inquiry into the religion, the more likely the transgression into foreign precincts outside the Court's legitimate concern. *United States v. Ballard*, 322 U. S. 78 (1944). It cannot be gainsaid that the Satmar Hasidic religion is founded on sincerely-held beliefs (*id.*) and that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U. S. 205, 224 (1972).[14]

Finally, the means selected by the State of New York to provide for the education of handicapped Satmar Hasidic children have resulted in the education of the children at a "neutral site" of the type approved by this Court in *Wolman* v *Walter*, 433 U. S. 229, 246-247 (1977) — a "practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Id.* at 247, n. 14. Moreover, there is nothing in the record to suggest that operation of the Kiryas Joel school system advances Satmar Hasidic religious interests or otherwise inculcates religious indoctrination, except

[14] *Amicus curiae* joins in the Petitioners' objection to Respondents' "dubious factual assertions" that "seek to besmirch the Satmar Hasidim by associating them with practices that seem strange and unacceptable in the modern world." Petitioner's Reply Memorandum, at 2. Needless to say, it is just such "strange and unacceptable" practices which the First Amendment is designed to protect.

other than incidently as a neutral and permissible accommodation of problems related to their religious practices.[15]

Perhaps most revealing in the present case is the Affidavit of Dr. Steven M. Benardo, a twenty-year veteran of the New York City Public School System with ten years of direct experience in education for the handicapped, who is also an expert in bilingual-bicultural education and the Superintendent of Schools of the Kiryas Joel School District. Monroe-Woodbury Appendix, 115a-116a. Notably, Dr. Benardo is "not a member of the Satmar Hasidic community or any other Orthodox Jewish group." He offered the following observations:

- He was never questioned by the Kiryas Joel Board of Education about his religious affiliation or religious practices. (*Id.* at 117a).
- All teachers in the Kiryas Joel School District are licensed by the State, were hired without regard to their religious affiliation, reside outside the Village and do not teach in religious schools. (*Id.* at 117a).

[15] Chapter 748 would also pass muster under the tri-partite *Lemon* test if that test were employed in this case. Chapter 748 meets this Court's application of *Lemon* principles in the similar case of *Wolman* v. *Walter*, 433 U. S. 229 (1977). First, the purpose of providing education for the handicapped is clearly a legitimate secular purpose, disproving any allegation that the enactment was "motivated *wholly* by a [religious] purpose." *Bowen* v. *Kendrick*, 487 U. S. at 602. Moreover, the purpose of the Satmar Hasidim in seeking the enactment was to alleviate psychological and emotional trauma for their children in attending neighboring schools. *Grumet* v. *Board of Education*, 592 N.Y.S.2d 123, 135 (A.D. 3 Dept. 1992) (Levine, J. dissenting).

Second, Chapter 748 does not have the impermissible primary effect of advancing religion because the education that is offered (a) is special, not general, in nature, (b) is secular in its subject matter, (c) is provided in a neutral secular setting and (d) is taught by secular instructors. *Wolman* v. *Walter*, *supra*. Chapter 748 also lifts a substantial burden on the Free Exercise of the Satmar Hasidic faith. In these circumstances, an objective observer would not recognize the enactment as an endorsement of the

- The public school building is not located adjacent to any synagogue, religious school or other religious institution or structure and there are no religious symbols or artifacts anywhere in the building on the walls or in the classrooms. (*Id.* at 118a).
- The program of instruction is entirely secular without religious training altogether, designed and approved in the same manner as any other public school district in the state of New York. (*Id.* at 118a).
- The school calendar is similar to that of other New York public schools and is approved by the Department of Education. (*Id.* at 118a).
- Instruction is done by male and female instructors to mixed classes of male and female students without any dress code for either. (*Id.* at 118a-119a).
- English is the primary language of instruction, supplemented with educationally appropriate bilingual and bicultural instruction. (*Id.* at 119a).

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religion. *Wallace* v. *Jaffree*, 472 U. S. 38, 76 (1985)(O'Connor, J. concurring). The argument that the New York enactment has created "a symbolic union" of church and state simply does not apply in the context of a law that is neutral on its face with a secular purpose of providing secular instruction through secular employees at a neutral site, let alone in the context of a neutral, permitted accommodation.

Finally, there is no impermissible "entanglement" because there is no sectarian/secular surveillance or monitoring problem. The program has no religious teaching or administration and thus does not present the typical surveillance or monitoring concerns found with religious institutions. As in *Aguilar* v. *Felton*, 473 U. S. 402 (1985), the present record indicates that the program operates in a secular fashion governed by secular rules devoid of religion. *Id.* at 428-29. Thus, "efforts to prevent religious indoctrination. . .have been adequate and have not caused excessive institutional entanglement of church and state." *Id.* at 429. Any potential for political divisiveness is remote: the neighboring Monroe-Woodbury School District has supported the enactment of Chapter 748.

- The school has accepted, based on the recommendations of other school districts, numerous non-Satmar students whose language and cultural needs could not be met by their own school districts. (*Id.* at 121a).

Dr. Benardo's observations are fully confirmed in the Affidavit of Philip R. Paterno, Director of Pupil Personnel Services for the Monroe-Woodbury Central School District. *Id.* at 110a-113a. Mr. Paterno concludes his Affidavit by stating remarkably that "I regard the school as a secular institution, staffed by public employees performing the public function of educating children." *Id* at 113a.

CONCLUSION

Just as this Court rejected the Establishment Clause claims in *Board of Education v. Allen*, 392 U. S. 236 (1967), it should for the same reasons reject the *facial* claim in this case. Like *Allen*,

> [T]his case comes. . . after summary judgment entered on the pleadings. Nothing in the record supports the proposition [advanced by the Petitioners]. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based *solely on judicial notice*, that this statute results in unconstitutional involvement of the State with religious instruction or that the [statute] for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

Id. at 248 (emphasis added). Absent proof of invidiously discriminatory intent, this Court should not (to paraphrase Justice O'Connor) "deprive the [Hasidim children] of a program that offers a meaningful chance at success in life. . .on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion

merely because they have walked across the threshold of a... school [operated by a public school district in a homogenous religious community]." *Aguilar v. Felton*, 473 U. S. at 431 (O'Connor, J. dissenting). This Court should not yield to the commands of purported constitutional doctrine that would ignore the power of a legitimately constituted political community to provide secular educational services at a *neutral* site without inflicting any demonstrated harm or injury in any quarter. It would likewise be a grave mistake to sanction a *per se* invalidation of a governmental subdivision solely because of the religious homogeneity of its political community. Instead, this Court should require Respondents to *prove* that Chapter 748 was enacted intentionally with the purpose of discriminating invidiously on the basis of religion and that the operation of the Kiryas Joel school system has placed a demonstrated disability or burden on persons by reason of their religion.

James Madison, the architect of the Religion Clauses, was all too aware of the need to protect the rights of those whose religious values seemed unusual or out of the ordinary. "Outside the jail in Orange, Virginia, he witnessed an imprisoned Baptist minister preach from the jailhouse window" and decried such persecution, writing to a friend "to pity me and pray for Liberty of Conscience [to revive among us]." Daniel L. Driesbach, *Real Threat and Mere Shadow* 136 (1987). It was his primary concern, notwithstanding near descendants who subscribed to the religion of the State Church of England, to protect the rights of dissenters and to guarantee the individual liberties retained by the governed to order their lives in accordance with their own values and principles.

The State of New York follows in that historical tradition of tolerance in its modern day effort to accommodate, in neutral fashion, a discrete, insular religious minority to provide educational services to handicapped children. In the absence of evidence of purposeful and adverse discrimination against other

persons or groups, or some other showing of impermissible prescription or proscription of religious teaching or practice, or the funding of religious churches or organizations, the *neutral* means selected here by the State of New York should not be deemed *per se* to be a violation of the First and Fourteenth Amendments and should be upheld against facial constitutional attack.

Respectfully submitted,

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